DEPARTMENT OF STATE
Washington

April 29, 1952

Dear Senator Moody:

Further reference is made to your letter of April 2, 1952, which was acknowledged on April 10, 1952, in which you requested the views of the Department concerning S. J. Res. 130, "Proposing an amendment to the Constitution of the United States relative to the making of treaties and executive agreements."

In the opinion of the Department of State, an amendment to the Constitution of the United States, such as that proposed in S. J. Res. 130, would not serve the best interests of the citizens or the Government of the United States.

The proposed amendment would run counter to the basic theory of a division of powers among the judicial, legislative and executive branches of the Federal Government, contained in the Constitution of the United States. It would so seriously interfere with the historic and fundamental functions of the Executive in the field of foreign affairs that it would jeopardize the influence of the United States in the world today. It would confer on Congress the authority by joint resolution to alter the Constitution and laws of the several States without regard to the Constitutional limitation in this field. It would prevent the United States from supporting great humanitarian treaties and subject this nation to charges of being a backward country without sincere interest in the rights of the individual.

More detailed comments follow:

By Section 1 it would be provided that -

> "No treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution, or abridging or prohibiting the free exercise thereof."

It may be stated at the outset that no treaty or other international agreement to which the United States has become a party abridges the rights guaranteed by the Constitution to citizens of the United States or abridges or prohibits the free exercise of such rights. On the other hand, certain treaties extend into the international field some of the guarantees, rights, and freedoms accorded by the Constitution of the United States. Such treaties would appear to be prohibited by Section 1 which would forbid any agreement "respecting the rights of citizens of the United States", etc. For example, the Convention between the

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United States and Other Powers to Suppress the Slave Trade and Slavery, signed at Geneva on September 25, 1926, and advised and consented to by the Senate on February 25, 1929, is an agreement "respecting" the rights of citizens of the United States, but it does not infringe on those rights in any way. It would be very difficult to explain to other Governments why the United States could not enter into such an agreement.

Furthermore, the failure of the United States to support humanitarian treaties and conventions would furnish a propaganda weapon to the Kremlin which would question our sincere interest in the rights of the individual.

At the time of the introduction of S. J. Res. 130, its author referred to the Covenant on Human Rights which is in process of being drafted in the United Nations. This Covenant has to do with rights guaranteed under the United States Constitution. However, even in its present form it contains the explicit provision, in Article 18, paragraph 2, that -

> "Nothing in this Covenant may be interpreted as limiting or derogating from any of the rights and freedoms which may be guaranteed under the laws of any Contracting State or any conventions to which it is a party."

Thus specific provision is included in the present draft of the Covenant on Human Rights that it is intended that the Covenant shall not be interpreted as limiting or derogating from any of the rights and freedoms guaranteed under the Constitution or other law of a Contracting State.

Moreover, the Covenant on Human Rights as presently drafted contains express provision that it shall not be self-executing, that is to say, it will require implementing legislation where law is not presently existing, and will not of itself automatically become operative as the law of the land. Article 1, paragraph 2, of the present draft of the Covenant on Human Rights expressly provides that "Where not already provided for by existing legislative or other measures, each State undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of this Covenant, to adopt within a reasonable time such legislative or other measures as may be necessary to give effect to the rights recognized in this Covenant." In other words, the provisions of the Constitution, for example, that Congress shall make no law abridging freedom of speech, or of the press, etc. will still be controlling in the United States, as legislation is to be adopted by each State

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party thereto, "in accordance with its constitutional processes", if law is not presently existing. It is this legislation which will translate the treaty provisions into American law and which the American courts will apply.

Nor would the division of power as between the States and the Federal Government under the United States Constitution be affected by provisions of the Covenant on Human Rights, under the formulafor a so-called Federal-State Article proposed by the United States at the 1950 session of the Human Rights Commission. The gist of the draft Article is that in a country having a federal form of government, rights and duties that are constitutionally within the powers of the Federal Government will remain within the province of the Federal Government, and rights and duties within the powers of the several States, under the Constitution, will remain within the province of the several States. From the outset of the consideration by the United Nations of a Covenant on Human Rights, the United States has insisted upon the inclusion of such a provision, and at the 1951 Session of the General Assembly that body approved consideration by the Human Rights Commission of such a provision for the Covenant.

In addition, every effort has been made, and will continue to be made, by the United States in the several bodies of the United Nations concerned with the drafting of the Covenant on Human Rights, that the Covenant when finally completed shall be in entire harmony with the United States Constitution, including the provisions of the Bill of Rights. If the Covenant is not in entire harmony with the Constitution of the United States, it will not be signed on behalf of the United States; or, at most, it will be signed subject to reservations necessary to make clear that the United States does not accept any provisions inconsistent with our Constitution.

Section 2 of the proposed Amendment would provide:

"No treaty

"No treaty or executive agreement shall vest in any international organization or in any foreign power any of the legislative, executive, or judicial powers vested by this Constitution in the Congress, the President, and in the courts of the United States, respectively."

Throughout the history of the United States, treaties and other instruments of agreement establishing international organizations have involved cooperation on the part of this Government with other governments. None of these agreements has had the purpose, intention, or effect of divesting any of the coordinate branches of the United States Government of any of its Constitutional powers and vesting such powers in an international organization. Nor are there under negotiation any agreements which would delegate such powers to an international organization.

We agree with the author of the proposed Amendment that "no treaty ever made" by the United States even purports to delegate the legislative, executive or judicial powers of this Government to an international organization. It is generally agreed, for example, that the United Nations is no "superstate", and the author of the proposed Amendment recognizes that the United Nations Charter does not undermine the sovereignty of the United States. On the contrary, the criticism most commonly heard of the United Nations today is that it is too weak and powerless to accomplish its major purpose of maintaining world peace.

Section 3 of the proposed Amendment reads:

"No treaty or executive agreement shall alter or abridge the laws of the United States or the Constitution or laws of the several States unless, and then only to the extent that, Congress shall so provide by act or joint resolution."

Except for the reference to the Constitution, this provision would result in nullification of the normal treaty processes without achieving any desirable objective, and with undesirable results. Consider, for example, a treaty of friendship, commerce, and navigation of the kind heretofore brought into force by and with the advice and consent of the Senate. Such a treaty usually contains certain provisions, necessary in the interests of stabilizing relations between the United States and a foreign country, which modify existing United States law for specific purposes and within specified limitations. It is desirable that, within the specified limitations, the treaty provisions should, pursuant to Article VI of the United States Constitution (quoted infra), prevail over contrary State laws, as they do and have since the adoption of the Constitution. The proposed Section 3 might well have the effect of causing serious difficulties in conducting the foreign relations of this country.

By Section 3

By Section 3 it would apparently be provided that no treaty or executive agreement shall be self-executing in character, i.e., every treaty and every executive agreement would require legislation by Congress in order, as the Section reads, "to alter or abridge the laws of the United States or the Constitution or laws of the several States".

This Section would appear to presume that Congress by joint resolution has authority to alter the Constitution and laws of the several States without regard to the Constitutional limitations in this field.

By Section 4 of the proposed Amendment it would be provided that "Executive Agreements shall not be made in lieu of treaties."

Generally speaking, "executive" agreements are of two classes. Certain executive agreements are entered into by virtue of the fact that the Executive power is by the Constitution of the United States vested in the President. Other agreements -- sometimes referred to as "legislative-executive" agreements -- are entered into by the Executive pursuant to legislative direction or authorization, either within the framework and intent of existing law or subject to legislative approval or implementation.

Those agreements falling within the Executive domain deal particularly with the Executive's constitutional powers in connection with the conduct of the foreign relations and with the exercise by the Executive of his powers as Commander in Chief of the Army and Navy.

For instance, agreements concerning the recognition of governments, concerning the settlement of certain types of international claims, and the participation in other settlements or negotiations fall within the powers of the Executive in his conduct of the foreign relations. Important examples of agreements entered into by the Executive as to foreign policy are the notes exchanges in 1899 and 1900 with Great Britain, France, Germany, Russia, Italy and Japan, as to the Open Door Policy in China; the Root-Takahira exchange of notes, November 30, 1908, as to the policy of the United States and Japan in the Far East; and the Lansing-Ishii agreement, of November 2, 1917, which was an exchange of notes between the Japanese Ambassador and the Secretary of State with reference to the policies of the respective Governments concerning China.

Agreements concerning truces, arranging armistices for the temporary suspension of military operations, and agreements concerning the exchange of prisoners of war are examples of agreements incidental to the powers of the Executive as Commander in Chief. Thus, the preliminary Articles of Peace between the United States and Spain, signed August 12, 1898, providing for the suspension of hostilities, for the immediate evacuation by Spain of Cuba and

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Puerto Rico, for the relinquishment of all claim to Spain to sovereignty over Cuba, and for the cession to the United States of Puerto Rico and certain other islands; the Final Protocol signed at Peking, September 7, 1901, by the foreign powers, including the United States, on the one hand, and by China on the other; and the agreement of 1859 between the United States and Great Britain for the joint military occupation of the Island of San Juan, which agreement remained in force until the evacuation of the Island in 1873 by the British forces, were agreements entered into by the Executive in virtue of his powers as Chief Executive and as Commander in Chief.

Examples of agreements entered into by the Executive pursuant to legislative authorization, either prior to or subsequent to the conclusion of the agreement, are: agreements relating to discriminating duties, and tariff and trade agreements entered into pursuant to legislative authorization, including such an agreement with Austria as early as May 7-11, 1829; agreements relating to the payment of money by the United States; postal agreements; agreements relating to copyright and trade-marks; military, economic or technical assistance agreements under the Mutual Security Act of 1951; Point 4 agreements; agreements for the exchange of publications; agreements for the reciprocal waiver of visa fees, etc.

The adoption of an Amendment to the Constitution thus to transfer to the legislative branch of the Government executive powers in innumerable fields would be in violation of the basic division of powers under the Constitution, as among the legislative, the executive and the judicial fields. It would deprive the Executive of means for carrying out Constitutional responsibilities that would remain in him if the Amendment were adopted.

Would the drafters of the proposed Amendment, and the proponents of such an Amendment, propose that the Congress, or possibly the Senate, pass upon all exchanges of notes with foreign powers? After all, each time a foreign power addresses a communication to the Secretary of State or the Executive, and the Secretary of State or the Executive replies, there is an exchange of notes; likewise each time a Foreign Office of another country addresses a communication to a diplomatic officer of the United States, and each time a diplomatic officer of the United States addresses a communication to a Foreign Office abroad, and there is a reply, there is an exchange of notes. Such notes may contain more or less formal agreements. If a foreign ambassador on behalf of his government requests recognition of his government, of its ambassador, of its territories and possessions, of its boundaries, of its public vessels, of its protests, of the validity of treaty provisions with his country, for instance, shall the Secretary of State refuse to reply until the Congress, or possibly the Senate, has acted?

Numerous executive agreements deal with matters of an administrative or technical character. Whether they relate to the supply of water

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to an American Embassy abroad, relief supplies, weather stations, or exemption from local regulations with reference to quarantine, delousing or fishing licenses, are they to be submitted for approval?

Just how this provision of Section 4 would be interpreted or enforced is not clear. If an executive agreement is entered into pursuant to the power reposing in the Executive because of his power to conduct the foreign relations or because of his power as Commander in Chief, the executive agreement is clearly not made in lieu of a treaty. If an executive agreement is entered into pursuant to an act or a joint resolution of Congress, i.e., if it carries out policy laid down by Congress acting within the powers assigned to it under the Constitution -- and many so-called executive agreements fall into this category -- the agreement may well be considered as not made in lieu of a treaty.

Granted that the question whether an agreement is of such a character as to call for Senate advice and consent to ratification is at times a technical and difficult one, the situation would not improve by providing by Constitutional amendment that "Executive agreements shall not be made in lieu of treaties". Who shall make the determination of the form in which international agreements are cast -- and by what formula? At times treaties have been referred to as the "more important acts", or as the more "formal" of international agreements. No definition automatically includes certain international agreements as treaties and automatically excludes others from that category.

It would further be provided by the second paragraph of Section 4 of the proposed Constitutional Amendment that -

> "Executive agreements shall, if not sooner terminated, expire automatically one year after the end of the term of office for which the President making the agreement shall have been elected, but the Congress may, at the request of any President, extend for the duration of the term of such President the life of any such agreement made or extended during the next preceding presidential term."

The practicalities of such a provision are open to serious question. The attitude of foreign governments toward such a provision, the impossible burden of detail and volume which would be imposed on the Congress, the fact that many executive agreements run in favor of the interests of the United States and contain commitments of foreign governments procured, perhaps after difficult and protracted negotiations, together with the numerous extraneous considerations which would doubtless be injected into the constant review of international agreements, these, and other considerations, demonstrate the impracticality of such a proposal, not to mention the serious unbalancing of the great constitutional division of powers among the executive, the legislative and judicial departments of Government.

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By a third paragraph of Section 4 of the proposed Amendment it would be provided that -

> "The President shall publish all executive agreements except that those which in his judgment require secrecy shall be submitted to appropriate committees of the Congress in lieu of publication."

So far as publication of "executive agreements" is concerned, it should be pointed out that "international agreements other than treaties" (the term used in the law of the United States regarding publication, 1 U.S.C. 112a) have been printed in the Executive Agreements Series and, beginning in 1945, are being printed in the Treaties and Other International Acts Series, issued by the Department of State. Those agreements, as well as treaties, have been published also in the United States Statutes at Large pursuant to then-existing 1 U.S.C. 30; and, beginning with 1950, are being published in volumes entitled Treaties and Other International Agreements pursuant to 1 U.S.C. 112a.

Article 102 of the Charter of the United Nations requires the registration with the United Nations of all international agreements of Members. The United States has endeavored to comply faithfully with that requirement for registration. Agreements, after registration, are published in the United Nations Treaty Series. The Department of State considers that it would be unfortunate to include in any amendment to the Constitution a provision implying an authorization to withhold certain agreements from publication in spite of the requirement of Article 102 of the United Nations Charter that "Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat /of the United Nations/ and published by it".

The basic assumption of the proposed Amendment is that such an Amendment is necessary in order to protect the Constitutional rights of individuals. This overlooks the safeguards to such rights which arise from the division of powers provided by the Constitution and which have been zealously guarded by the President, the Congress and the Supreme Court throughout our history as a nation.

It is true that the Supreme Court has never found a treaty provision to be unconstitutional. The courts have had little occasion to pass directly upon the constitutionality of a treaty. This in itself is significant evidence that the President and the Senate have been scrupulous in their exercise of the treaty power.

It is important to note that in a long line of decisions the courts have established the principle that a treaty may be superseded by a subsequent Act of Congress. See authorities cited in Volume V

of Hackworth,

of Hackworth, Digest of International Law (1943), section 489, page 185 and following. The courts thus rank treaties on a par with Federal legislation. No one disputes that the courts would invalidate Federal legislation which violates the Constitution. If the courts hold that an Act of Congress can operate to supersede treaties, they would certainly not rule that treaties are superior to the Constitution. There is thus no basis to assume that the courts will repudiate the principle set forth by the Supreme Court in de Geofroy v. Riggs, 133 U.S. 258, 267 (1890) and repeated in Asakura v. City of Seattle et al., 265 U.S. 332 (1924), that the treaty power does not extend so far as to authorize what the Constitution forbids.

Article VI of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Attention is called to the fact that Article VI provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made ... shall be the supreme law of the Land". Also, attention is invited to the fact that the same sentence provides that the Judges in every State shall be bound thereby "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It is misleading to read out of context the provision that "all Treaties ... shall be the supreme law of the Land." Article VI expressly provides that "This Constitution ... and all Treaties ... shall be the supreme law of the Land"; and that the Judges in every State shall be bound thereby, "any Thing in the Constitution ... of any State to the Contrary notwithstanding."

Sincerely yours,

For the Secretary of State:

Jack K. McFall
Assistant Secretary

TRANSMITTAL SL

(Date)

TO: Mr. Houston - Gen Counsel

BUILDING | ROOM NO.

REMARKS:

Mr. Wisner has seen. Thank you

FROM: DDP

BUILDING | ROOM NO. | EXTENSION

FORM NO. SEP 1946 36-8

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